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No. 04-698

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN and MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND EIGHT OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450, when parents of a disabled child and a local school district reach an impasse over the child's Individualized Education Program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the administrative hearing, which side has the burden of proof – the parents or the school district?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Connecticut, Illinois, Kansas, Minnesota, Nevada, Rhode Island, Washington, Wisconsin ("States"), have voluntarily chosen to receive federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 ("IDEA"). Consistent with the IDEA, the States, through their local school districts – all of which are created by the State and which are ultimately responsible to the State[1] – provide a Free and Appropriate Public Education for every disabled child in the school district. *See* 20 U.S.C. § 1412. Because every disabled child has different needs, the school districts, in consultation with the disabled child's parents, must develop an Individualized Education Program ("IEP") for each child.[2] *See* 20 U.S.C. § 1412(a)(2). In most instances, the parents and the school district readily agree on the content of the IEP. However, on occasion, the parents and the school district do not agree. In those instances, either the parents or the school district may seek an administrative hearing.[3] *See* 20 U.S.C. § 1414(a)(1)(C)(ii). The IDEA is silent on the issue of which side bears the burden of proof in that hearing.[4] The Circuits are divided on the

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[1] *See Rose v. Council for Better Education*, 790 S.W.2d 186, 208 (Ky. 1989); *Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968); *Moore v. Board of Education*, 193 S.E. 732, 734 (N.C. 1937).

[2] IDEA expressly guarantees to the parents the right to participate in this process. *See* 20 U.S.C. §§ 1414(d)(1)(B)(i) and (f).

[3] The decision of an administrative hearing officer may be appealed to either a state court of competent jurisdiction or a federal district court. 20 U.S.C. § 1415(i)(2)(A).

[4] In the 3,000 or so administrative hearings held each year under the IDEA, the role played by the burden of proof is self-evident. *See* Government Accounting Office, *Report to the Ranking Minority Member, Comm. on Health, Education, Labor, and Pensions* 1 (Sept. 2003) (reporting 3,020 administrative hearings held in 2000). However, the

(Continued on following page)

question, and this Court has granted certiorari to resolve the conflict.[5] *See* 125 S. Ct. 1300 (2005).

By filing this Brief in Support of the Petitioners, the States urge this Court to declare that when there is an administrative hearing regarding the contents of an IEP, the school districts bear responsibility for their decisions and therefore should shoulder the burden of proof. Alternatively, if this Court concludes that the burden should always be on the party seeking to alter the status quo, then the States ask this Court to recognize explicitly the

significance of the burden goes far beyond these hearings. More than 6.5 million students have IEPs in place. *Id*. Each IEP is the result of a statutorily mandated process in which parents have a right to participate as well as a right to appeal any decision by the school district not to accommodate their requests.

[5] Four Circuits – the Fourth, Fifth, Sixth, and Tenth – place the burden of proof on the parents. *See Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *cert. granted*, 125. S. Ct. 1300 (2005); *Doe v. Board of Education of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986). In contrast, six Circuits – the Second, Third, Seventh, Eighth, Ninth, and the District of Columbia – place the burden of proof on the school district. *See Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2nd Cir. 1998); *Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3rd Cir. 1993); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985). Indeed, only two Circuits – the First and Eleventh – have not addressed the issue. *But cf. T.B. ex rel. N.B. v. Warwick School Cmte.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (stating in dicta that the school district always bears the burden of proof). *Devine v. Indian River County School Board*, 249 F.3d 1289, 1292 (11th Cir. 2001) (Once an initial IEP is in place, the burden of proof is on the party that wishes to change the IEP.).

authority of the States to determine and direct that local school districts assume the burden of proof.[6] Recognition of the States' authority to reallocate the burden of proof in IDEA hearings would be consistent with cases recognizing the authority of the States to enhance the protections of the IDEA. *See Blackmon*, 198 F.3d at 659; *Burke County Board of Education v. Denton*, 895 F.2d 973, 982-83 (4th Cir. 1990); *Board of Education of East Windsor Reg'l School District v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 418 (1st Cir. 1985).

In taking the position that the burden should be on the school districts or, alternatively, that the States may direct the school districts to assume the burden of proof, the States pursue three separate and distinct state interests.

1. First, the States have an interest in complying with their respective State Constitutions and with the IDEA.

[6] Many of the States would be willing to take this step. For example, in 1977, shortly after the IDEA was adopted, the Minnesota State Board of Education promulgated two rules that placed the burden of proof on school districts in special education due process hearings. One rule required a local school district to give parents who request a due process hearing a notice that states that at the hearing the burden of proof is on the school district to show that the proposed action is justified because of the child's educational needs, current educational performance, or presenting handicapping condition. Another rule, establishing hearing procedures, stated that "[t]he school district(s) shall bear the burden of proof as to all facts and as to grounds for the proposed action." In 2003, the Minnesota Legislature incorporated the burden of proof provision in statute, *see Minnesota Statute* § 125A.091, subd. 16.

a. Although education is not a *federal* fundamental right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973), every State Constitution has a provision mandating, at a minimum, that the State provide a system of free public schools.[7] While these state constitutional "education clauses" have significant textual differences, most, if not all, of the States have a state constitutional duty to provide a free quality education to all children – including those with disabilities – in the State.

In discharging this duty to provide a quality education to all children, the States typically make general policy, but delegate much of the responsibility to the local school districts. Charles J. Russo, *The Law of Public Education* 138 (5th ed. 2004). Yet, despite this delegation of authority over the day-to-day implementation of education policy, the State remains responsible for assuring that the state constitutional mandate is met. *Id.* at 141 ("Delegation aside, legislatures cannot avoid their constitutional

[7] *See* Ala. Const. art. 14, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § VII, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. 8, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W.Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

responsibilities by act of delegation to local authorities."). Indeed, when local school districts fail in their responsibilities under state law, the States often are obligated to intervene. *See Butt v. California*, 842 P.2d 1240, 1256 (Cal. 1992); *In re Board of Education of Trenton*, 431 A.2d 808, 810 (N.J. 1981).

b. Similarly, the IDEA imposes certain duties on the States. *See Board of Education v. Rowley*, 458 U.S. 176, 183 (1982) ("[A]lthough the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility."). *See also Id.* at 189 ("[T]he Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an 'inadequate education.'"); *Id.* at 189. The statute "evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.") *Id.* (emphasis original). Moreover, if a local school district fails to fulfill its obligations under the IDEA, the State itself may be obligated to provide the required services. *See Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986), *aff'd by an equally divided court sub nom. Honig v. Doe*, 484 U.S. 305 (1988). Because the State is responsible to the National Government for compliance with the IDEA, it has an interest in making sure the local school districts are accountable for their IEP decisions.

c. Requiring school districts to explain why their proposed IEP is appropriate is one way to address the States' concern for local IDEA compliance. When parents and

educators disagree about the appropriate course of instruction for a child, the educators ought to have to explain to the State – the party ultimately responsible – why the educators' proposed IEP complies with the IDEA. The requirement that school district officials establish the appropriateness of their recommendation is not only proper in the IDEA context, it is sound public policy that promotes government accountability to its citizens.[8] School districts are better equipped to explain and justify their decisions. In order to prevail, the school districts need only explain why their proposed IEP meets the standards of the IDEA. Such an explanation promotes government accountability. This expectation will promote the careful consideration by school districts in the IEP process, not just of their own expert point of view, but of the information and opinions of parents. In other words, placing the burden of proof on the school districts in IDEA hearings will provide the States greater assurance that their obligations under both the State Constitution and the IDEA are being fully met.

2. Second, the States have an interest in providing disabled children the opportunity to learn and to minimize the limitations that result from their disabilities.[9] In fact,

[8] Indeed, when the government makes a decision that results in the deprivation of a constitutionally protected property interest, the Constitution requires that the government explain and justify its decision. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

[9] This position is entirely consistent with the position of those States that assert that they should be immune from damages claims for violations of the civil rights statutes protecting disabled individuals. *See Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *Medical Bd. of California v. Hason*, *cert. voluntarily dismissed*, 538 U.S. 958 (2003); *Board of Trus. of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). *See also*

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many States prohibited disability discrimination by non-governmental actors before the National Government did so.[10] *See Garrett*, 531 U.S. at 368 n.5. However, because many States once had policies excluding disabled children from the public school, Congress was motivated to pass the IDEA. *See Rowley*, 458 U.S. at 179. While the IDEA has dramatically transformed education for disabled children, Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 Educ. L. Rptr. 35, 35-36 (2005), the process for resolving disputes between parents and school districts continues to present challenges. *See Id.* at 36-38 (discussing current problems with the dispute resolution process and suggesting solutions that would reduce the costs of litigation). One way to continue this transformation of education for disabled children is to require school districts to bear the burden of proof in IDEA administrative hearings. A challenge to the local school district's recommendation should provide parents a meaningful opportunity to be heard, not a quixotic exercise in judicial deference to government decision-making. The availability of a meaningful challenge ensures that the party with the knowledge, the expertise, and the resources – the school

Petition for Certiorari, *United States v. Georgia*, (U.S. March 9, 2005) (No. 04-1203); Petition for Certiorari, *Goodman v. Georgia*, (U.S. March 9, 2005) (No. 04-1236); Petition for Certiorari, *Columbia River Corr. Inst. v. Phiffer*, (U.S. Jan. 11, 2005) (No. 04-947) (all seeking review of the issue of whether sovereign immunity is abrogated for claims under Title II of the Americans with Disabilities Act in the prison context). Disability discrimination has no place in our society. However, that does not mean that those States' Treasuries should be subjected to damages claims.

[10] Indeed, Virginia passed the Virginians with Disabilities Act, *Virginia Code* § 51.5-1, more than five years before Congress passed the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12189.

district – employ these tools in a demonstrable way in the development and justification of an IEP. Ultimately, such a step will improve the quality of decision-making.

3. Third, the States have an interest in making sure parents are able to be actively involved and effective in the decisions concerning the education of their children. Indeed, this Court has recognized a constitutional right of parents to direct the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as enduring American tradition."). In an effort to equip parents to better exercise their constitutional rights, the States have adopted measures such as accountability testing, *see Virginia Code* § 22.1-253.13, school choice programs, *see Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring), and charter schools, free from bureaucratic regulations. *See In re Grant of Charter School Application*, 753 A.2d 687, 689 (N.J. 2000); *Board of Education v. Booth*, 984 P.2d 639, 642-43 (Colo. 1999); *Council of Organizations and Others for Education About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208, 213 (Mich. 1997). These efforts enable parents to make effective decisions about the education of their children. Assigning the burden of proof to the school system in IDEA administrative hearings is a similar effort on behalf of the parents of disabled children.

The judgment of parents who have good faith disagreements with the local school district over the content of *their* child's IEP should not be secondary to the judgment of

the school district. Forcing parents to bear the burden of proof is to treat the school district's judgment as superior to that of the parents. Parents are already at a disadvantage vis-à-vis the school when disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to their attachment to the child. *See* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 187-94 (1991). The parents of disabled children should not be at a disadvantage or be overwhelmed. Moreover, because "the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student's parents are in to show that the school district has failed to do so," *Weast*, 377 F.3d at 457 (Luttig, J., dissenting), parents bearing the burden of proof are put at exactly such a disadvantage. Given that an IEP can transform a child's life, if the school district wishes to implement an IEP over the parents' objections, then it is entirely reasonable to ask the school district to provide the evidence necessary to support its decision.

SUMMARY OF ARGUMENT

The States' argument in favor of the Petitioners is straightforward

1. Initially, the school district should bear the burden of demonstrating that its proposed IEP complies with the IDEA. This is so for two reasons. First, requiring the school district to bear the burden of demonstrating that its proposed IEP complies with the IDEA promotes governmental

accountability. Second, requiring the school district to bear the burden of demonstrating that its proposed IEP complies with the IDEA promotes fundamental fairness.

2. Alternatively, if this Court concludes that the burden of proof should be allocated to the party challenging the IEP – almost inevitably the parents – then this Court should expressly recognize authority of the States to determine that their local school districts should bear the burden of proof and, by statute or regulation, direct them to do so. Such authority must be recognized for two reasons. First, the States have plenary power to define the powers and duties of local school districts. Second, recognizing such authority is consistent with constitutional principles of federalism.

ARGUMENT

I. THE SCHOOL DISTRICT SHOULD BEAR THE BURDEN OF DEMONSTRATING THAT ITS PROPOSED IEP COMPLIES WITH THE IDEA.

The IDEA is "an ambitious federal effort to promote the education of handicapped children" that was prompted by "Congress' perception that a majority of handicapped children . . . were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (brackets in original) (internal quotation marks omitted). The law expresses "an abiding concern for the welfare of handicapped children and their parents." *Lascari v. Board of Education*, 560 A.2d 1180, 1188 (N.J. 1989). Congress sought to promote the education of children with disabilities by requiring the *States*, through

their local school districts, to provide every disabled child with an educational program that is reasonably responsive to that child's disability. *Rowley*, 458 U.S. at 188-89. In other words, the IDEA imposes an affirmative obligation on the States to provide a "Free and Appropriate Public Education" to disabled children.[11]

Furthermore, by requiring that disputes between parents and school districts be resolved through "due process hearings," 20 U.S.C. § 1415(f), the IDEA itself tells courts where to look to decide procedural issues like the burden of proof. Under this Court's due process jurisprudence, when there is a dispute between the government and a citizen, and where "the 'individual interests at stake . . . are both *particularly important* and *more substantial than mere loss of money*,'" the burden of proof must be "on the State." *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (other internal quotation marks and citations omitted) (emphasis added).

[11] Additionally, it may be that the existence of an affirmative obligation on the government to act distinguishes the IDEA from most other civil rights laws. To explain, laws such as Title VI, 42 U.S.C. § 2000d, and Title IX, 20 U.S.C. §§ 1681-1688, require that government *refrain from acting*. Government violates the Title VI and Title IX only when it *actually acts* – when the government's action constitutes intentional discrimination. *See Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005) (Title IX); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (Title VI). The underlying presumption is that the government will *not* do that which is prohibited. In contrast, the IDEA requires the government to *act affirmatively* to provide an education to the disabled child. Government violates the IDEA when it *fails to act* – when the proposed IEP is inadequate to provide a "Free and Appropriate Public Education." The underlying assumption is that the government must do that which is required.

A. Requiring the School District To Bear the Burden of Demonstrating That Its Proposed IEP Complies With the IDEA Promotes Governmental Accountability.

The fact that the IDEA imposes an affirmative obligation on the government suggests a greater need for government accountability. In other words, the government must demonstrate that it has done what it is obligated to do by statute. "Requiring parents to prove . . . that the school has failed to comply with the Act would undermine the Act's express purpose 'to assure that the rights of children with disabilities and their parents are protected,' and would diminish the effect of the provision that enables parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements." *Oberti*, 995 F.2d at 1219 (citations omitted). Indeed, in those contexts where the IDEA has established a presumption in favor of a particular service, such as the presumption in favor of mainstreaming, 20 U.S.C. § 1422(5)(B), placing the burden on the parents would actually "turn the statute on its head." *Oberti*, 995 F.2d at 1219. Rather, the school district should demonstrate that its proposed IEP meets the standard of IDEA.

B. Requiring the School District To Bear the Burden of Demonstrating That Its Proposed IEP Complies With the IDEA Promotes Fundamental Fairness.

To the extent that the interests of fundamental fairness are relevant to the allocation of the burden of proof, *see Keyes v. School District No. 1*, 413 U.S. 189, 209 (1973), the burden should be assigned to the party that controls the essential evidence and/or possesses superior

knowledge of the facts. *See NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176-77 (D.C. Cir. 1965) (holding that the burden of proof should be allocated to the party who controls the relevant information needed to decide the dispute); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947) (stating the question of fairness affects the assignment of the burden of proof).

In an IDEA administrative hearing, the party that controls the essential evidence or possesses superior knowledge of the facts is the school district. As the Third Circuit observed:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

Oberti, 995 F.2d at 1219. Moreover, as Judge Luttig observed:

> For the vast majority of parents whose children require the benefits and protections provided in the IDEA, the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering. By the same token, most of these parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children.

Weast, 377 F.3d at 458-59 (Luttig, J., dissenting). In short, when parents choose to litigate with a school district over the appropriate course of an IEP for *their* child, they face an opponent that has more information, more expertise, more experience, and, in the vast majority of cases, more resources. In order to correct this imbalance, it is necessary to place the burden on the school district. *See Lascari*, 560 A.2d at 1188 (noting that placing the burden of proof on school is "consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.").

II. THE STATES HAVE THE AUTHORITY TO DIRECT THEIR LOCAL SCHOOL DISTRICTS TO ASSUME THE BURDEN OF PROOF.

For the reasons explained above, this Court should hold that the burden of proof in an IDEA administrative hearing is always on the school district. However, this Court may choose to adopt the minority position and hold that the burden of proof is always on the party seeking to change the IEP. As a practical matter, this would mean that the burden is almost inevitably on the parents of disabled children.

If this Court chooses the second path, then the States request this Court to also explicitly recognize that the States have the authority to direct that their local school districts bear the burden of proof in an IDEA administrative hearing. In other words, the States desire an explicit acknowledgement that a State, as a matter of policy, may decide that school districts should bear the burden and direct its school districts to abide by the State's choice.

A. The States Have Plenary Power Over the School Districts.

First, allowing the States to direct that the school districts must bear the burden of proof recognizes the constitutional reality that local school districts "have only such power and authority they are granted by their state legislatures." Russo, *supra*, at 138. *See also National Education Ass'n v. Unified School District No. 259*, 674 P.2d 478, 482 (Kan. 1983); *Academy of Charter Schools v. Adams County School District No. 12*, 32 P.3d 456, 469 (Colo. App. 2001). Moreover, in some States, local school districts are considered an "arm of the State." *See, e.g.*, *Ambus v. Granite Board of Education*, 995 F.2d 994, 997 (10th Cir. 1993) (*en banc*) (Utah School Districts). In these States, the decision to direct a local school district to assume the burden of proof is no different from directing a state agency or institution of higher education to take on a particular role. Because all States have plenary power to create school districts and to define their powers, and duties,[12] there is no federal limitation that precludes an exercise of the States' authority to require that school districts accept responsibility for justifying their IEP decisions.

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[12] Of course, the States may limit, as a matter of state constitutional law, their own powers with respect to local school districts that they have created. *See, e.g.*, Colo. Const. art. IX, § 15 (Each school district controls instruction in its schools.).

B. Allowing the States To Direct Their School Districts To Assume the Burden Is Consistent With the Constitutional Value of Federalism.

Permitting the States to shift the burden of proof from the parents to the school districts also vindicates the constitutional principles of federalism. In our system of dual sovereignty, the States serve as laboratories for policy experimentation. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., joined by O'Connor, J. concurring). *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In fact, the IDEA has an implicit federalism component. If a State passes legislation that confers substantive rights which are greater than those conferred by the IDEA, then those additional substantive rights may be enforced through the IDEA administrative process. *Blackmon*, 198 F.3d at 658-59; *Denton*, 895 F.2d at 982-83; *Diamond*, 808 F.2d at 992; *David D.*, 775 F.2d at 417-18. In other words, the IDEA establishes a floor, but the States have the authority to build a platform that is above the federal floor.[13] *See Converse County School District No. 2. v. Pratt*, 993 F. Supp. 848, 855 (D. Wyo. 1997); *Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (both holding that the IDEA preempts state law and regulations only to the extent that the state standards confer less benefits than the IDEA). By placing the burden of proof on the school districts, States simply would be

[13] In this respect, the relationship between the IDEA and substantive State law is like the relationship between the United States Constitution and the State Constitutions. *See generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976).

choosing, as a matter of policy, to improve the position of parents just as it may enact additional substantive rights for disabled children. If the States are allowed to confer additional *substantive* benefits for children, then surely the States are allowed to confer additional *procedural* benefits on their parents.

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Fourth Circuit should be **REVERSED**.

Respectfully submitted,

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